ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED JUNE 13, 2005)
(EXCEPTIONS DUE 7-5-05)
(REPLIES TO EXCEPTIONS DUE 7-27-05)

FEDERAL MARITIME COMMISSION

Docket No. 04-05

AHL Shipping Company

v.

Kinder Morgan Liquids Terminals, LLC; Oiltanking Houston, LP;
Williams Energy Partners, LP; and Magellan Midstream Partners, LP

ADMINISTRATIVE LAW JUDGE INITIAL DECISION[1]

This case is before me on a complaint filed by the operator of a small fleet of vessels engaged in the business of transportation of liquid products, most often between ports of the United States (coastal trade) but on occasion between foreign ports and ports of the United States. The respondents operate marine terminals in the port of Houston, Texas for liquid products. The complaint alleges these marine terminal operators (MTO) have engaged in unreasonable practices and have unreasonably refused to negotiate with the complainant over charges for essential services needed by the complainant's vessels and crews.

1 This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502 227).

Respondents assert the charges are reasonable as tested by acceptance in the marketplace in the port of Houston.

A hearing was conducted in Houston, Texas on May 24, 2005. A witness testified on behalf of the complainant. Two of the respondents also each produced a witness to testify on their behalf. Documents offered in evidence by each of the parties were received without objection. Arguments of counsel, both oral and written, have been received and considered.[2] Based on my review of the record, I make the following findings of fact and conclusions of law.

FACTUAL FINDINGS

Complainant is the operator of a small fleet of tank vessels that are time chartered to a variety of dealers in liquid products. The vessels are directed by the charterors to various ports, domestic as well as foreign, to transport products. One of the ports frequented by complainant's vessels is Houston, Texas. When directed to a particular port, complainant's vessels are required to use particular marine terminals at which products to be transported can be loaded or unloaded. The charter agreement (referred to as the "charter party") as well as established custom in the business dictate which entity pays for certain services provided to the vessel, crew and cargo. The charterer pays for all cargo related necessities. The vessel, through her owners, pays for vessel and crew essentials. Vessel costs include fresh water and stores as well as shore time for the crew. At least

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2 In its Post-hearing Memorandum, AHL withdrew its claim for any monetary reparations and simply requests that FMC establish regulations limiting the amount of charges by MTOs

in the short term, the vessel is compelled to pay for these items at the rate charged by the marine terminal operator to which it was directed by its charterer. In the longer term, the vessel may change its methods of operation to take advantage of cost savings offered by other elements of the available market.

Each of the Respondents is a marine terminal operator engaged in the business of loading and unloading liquid products in the general category of petrochemicals. The materials handled in bulk are, to say the least, flammable. Each of the Respondents is required to comply with the Shipping Act of 1984 (a statute administered by the Federal Maritime Commission) as well as the Maritime Transportation Security Act (a statute administered by the Department of Homeland Security through the Coast Guard). Since September 11, 2001, each of the Respondents has conducted an assessment of the charges made to vessels for services other than loading and unloading of cargo. New rates for services take into account the facility security requirements imposed by the Maritime Transportation Security Act. Because of the clear attraction of the petrochemical transportation and storage facilities of the Houston Ship Channel as targets for terrorist activity, security activities reasonably represent a priority business expense of marine terminal operators in this area.

Complainant has made allegations distinguishable in details as concerns the charges made by each of the Respondents. However, the allegations fall into two main categories; first, charges for allowing services to be provided to a vessel from other vessels, and second, charges for assistance to crew leaving the terminal area or returning through the terminal area. The evidence was clear

that each of the Respondents has established rates for these services which Respondents have refused to modify in the face of multiple lawyerly arguments. Respondents take the apparent position that they are not required to modify those rates unless and until the arguments presented establish that the rates as applied to a particular customer in a particular situation are unreasonable. Respondents contend further that at no time relevant to this case has the complainant established that any rate charged by the Respondents was unreasonable.

Complainant's operations manager, Captain Jere M. White, testified both in person at the Houston hearing and by deposition transcript. He described the activities of AHL in the chartered tanker business. He went on to describe the needs his vessels have for special services while engaged in business at the Port of Houston. These special services represent a cost to the vessel owner rather than to the business charterer of the vessel. Therefore, when those costs increase the costs represent a particular concern for Mr. White, the person responsible for assuring a profitable operation of the fleet of vessels owned by AHL. Mr. White expressed both concern and some outrage at cost increases made by the respondents in the past several years. In fact, Mr. White testified at one point that his interest in this case was more a matter of principle than of dollars. (Tr. 97)

Captain White testified in some detail on the interconnections between the operations of his vessels and operations of the respondents' marine terminals. For example, he testified about his first experience with a charge of $3,500 for a

water barge to transfer water to his vessels. (Tr. 45) It was clearly his opinion that the entire charge was a profit to the terminal since they incurred no cost to provide no service. 3 For the instance of a fuel bunker barge, Captain White was willing to concede that the terminal operator incurred some risk of spills and therefore incurred an implicit cost to be recovered by a charge to the vessel. As to the benefit side of the coin, Captain White testified candidly that permission to operate a water loading barge saved the vessel several times the $3,500 charge in avoided costs in obtaining the water from an alternative location.

As to charges for providing escorts for crew leaving or returning to the vessel, Captain White was of the opinion that little cost was incurred by the marine terminal and little benefit was conferred on the vessel. He described the escort services as little more than rides in the back of a pick-up irregularly dispatched to the vessel while engaged in other business. He believed that $25 for such a lift to the terminal gate was an outrage, another example of high cost for no service.

Witnesses for the respondent marine terminals naturally testified in a very different light about the risks and costs inherent in the services they provide. According to these witnesses, much of the complexity and rigidity in these services originates in the Coast Guard approval process for Facility Security Plans under the Marine Transportation Security Act, 33 U.S.C 1221 *et seq.* as

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3 It is particularly instructive to note Captain White said ". . . it used to be where you'd get water right off the dock; they'd let you hitch up to a fire main and just take city water, but I guess they decided to take that option away, too." For most of his business life, Captain White obviously thought water was free

well as implementing regulations. These changes in port operations following the events of September 11, 2001, resulted in great increases in marine terminal liability and organization.

The Coast Guard regulations on security requirements for marine terminals are found at 33 C.F.R. §105. The regulation requires a terminal operator to designate an employee responsible for security operations. The responsible employee must receive training and then the entire terminal staff must receive security training. Drills and exercises are required. Records must be kept and activities must be monitored. Communication protocols must be established. A Facility Security Plan must be developed, submitted to Coast Guard for approval, and followed or amended. See, 33 C.F.R. §105.410. There are sections of the regulation dealing with the specific subjects of access control and delivery of vessel stores and bunkers. See, 33 C.F.R. §§105.255 and 105.270. The control of access to the terminal includes identification of visitors, control of delivered material (particularly unaccompanied baggage), and denial of access to unidentified persons. The control of delivery of stores and bunkers includes measures for inspection of packages to assure integrity and lack of tampering. The terminal operator is required to establish delivery schedules to assure that persons bringing material to and through the terminal are the intended carriers. Some level of inspection and monitoring of deliveries is also required.

All of this security activity costs money to implement, either in actual out-of-pocket expenditures or in frustrated efficiencies. (Tr. 146, 155) Both Mr.

McDonald and Mr. Reed testified that charges for allowing barges alongside and for personnel transportation were set on the basis of both cost to the terminal operator and comparable charges by competitive companies. While the rates do not appear to be uniform among the various marine terminal operators in the Port of Houston, there is no evidence in this record that the variations are so wide as to make the charges levied by the respondents out of the normal range. No witness disputed that assertion that all other participants in the market segment in which AHL does business have accepted these charges without objection.

CONCLUSIONS OF LAW

1. Respondents are marine terminal operators as defined in the Shipping Act of 1984, 46 App. USC § 1702(14)

2. Jurisdiction over this controversy rests with the Federal Maritime Commission under section 11 of the Shipping Act of 1984, 46 App. USC §1710.

3. Complainant alleged violation of sections 10(b)(10), 10(d)(1) and 10(d)(3) of the Shipping Act of 1984. Complainant has the initial burden of proof to establish these violations. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true.

4. The applicable test for determining whether a rate or charge is reasonable is the test stated by the Supreme Court in *Volkswagenwerk v. Federal Maritime Commission,* 390 U.S. 261 (1968). The Court in that case held

that a charge is reasonable when it is reasonably related to the service rendered. The Court did not hold that a charge must have a mathematical relationship to the cost of providing the service in order to be reasonable, but rather held that the relationship of charge and service must be capable of being understood. The charges at issue in this case are related to the service provided through market place competition as well as cost analysis. A service charge generally accepted by the market segment that includes the complainant is presumed to be reasonable. The complainant in this case has not presented evidence that overcomes that presumption.

ORDER

For all the reasons stated above, I find in favor of the respondents. The complaint in this case is **DISMISSED.**

Irwin Schroeder
Administrative Law Judge

Washington, D.C.
June 13, 2005